20-P-74 Appeals Court

COMMONWEALTH vs. CONCETTO COSTA.

No. 20-P-74.

Essex. November 5, 2020. - April 8, 2021.

Present: Henry, Sacks, & Englander, JJ.

Due Process of Law, Probation revocation. Constitutional Law, Confrontation of witnesses. Evidence, Hearsay, Cross-examination, Opinion, Reputation, Police report, Pattern of conduct, Impeachment of credibility, Credibility of witness, Grand jury proceedings, Testimony before grand jury, Unavailable witness. Witness, Unavailability, Victim, Impeachment, Police officer, Cross-examination, Credibility. Practice, Criminal, Probation, Revocation of probation, Hearsay, Confrontation of witnesses, Findings by judge, Grand jury proceedings, Transcript of testimony before grand jury, Witness.

Indictments found and returned in the Superior Court Department on March 22, 2006.

A motion to exclude unreliable hearsay was heard by Janice W. Howe, J., and a proceeding for revocation of probation was heard by Kathe M. Tuttman, J.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Kathryn E. Leary, Assistant District Attorney, for the Commonwealth.

SACKS, J. The defendant's probation was revoked after a Superior Court judge found that he had violated his probation by committing rape and other new offenses against his then-girlfriend, Jen (a pseudonym). On appeal, the defendant contends that (1) Jen's hearsay statements were not substantially reliable and were therefore inadmissible at the violation hearing, (2) an order barring him from calling Jen as a witness at that hearing violated his due process right to present a defense, and (3) the hearing judge's exclusion of testimony by which the defendant sought to undermine the credibility of Jen's allegations also violated his right to present a defense. We are unpersuaded by these contentions and therefore affirm.

Background. We recite the background facts, reserving numerous details for our discussion of the issues presented. The defendant pleaded guilty in 2008 to four counts of rape of a child and one count of indecent assault and battery on a child under the age of fourteen for conduct occurring in 1988 through 1993 when he was in his late teens and early twenties. He was sentenced to concurrent seven-to-ten-year prison terms on three of the rape counts, followed by concurrent ten-year probationary terms on the remaining counts. He began serving his probation in 2014.

The defendant began dating Jen in May 2018; they became engaged, and they moved into an apartment together in October 2018. At that point, the relationship deteriorated and, according to Jen, began to include "violence, threats of violence, [and] forced sexual activity." On February 11, 2019, Jen reported the defendant's actions to Sergeant James Leavitt of the Salisbury Police Department. She told him that she had "recently been thinking about how to end the relationship and get away from [the defendant]," but she feared that, due to his possessive nature, he would retaliate violently. Sergeant Leavitt described Jen's demeanor as "very upset, crying for most of the time [they] met, scared." He helped her obtain a G. L. c. 209A restraining order against the defendant.

The defendant was subsequently charged by complaint with multiple counts of rape, kidnapping, threats, and assault and battery on a household member. Jen then testified before a grand jury, and the defendant was indicted.[1]

A notice issued charging the defendant with violating his probation by committing these new offenses. Before the violation hearing, he moved to exclude Jen's hearsay statements

[1] The indictments, which remain pending, were for four counts of rape and one count each of assault and battery by means of a dangerous weapon, assault and battery on a family or household member, witness intimidation, kidnapping, and threatening to commit a crime.

from evidence, arguing that they were unreliable and that he had a due process right to challenge her credibility by calling her as a witness. In support of the motion, he submitted reports of interviews that his private investigator had conducted with Jen's ex-husband and an ex-boyfriend, as well as with the defendant's and Jen's neighbors. The reports, broadly speaking, characterized Jen as aggressive, loud, and untrustworthy. Counsel also submitted several of his own affidavits containing additional information aimed at casting doubt on Jen's credibility. A motion judge denied the defendant's motion to exclude Jen's hearsay statements and allowed the Commonwealth's[2] motion to preclude the defendant from calling Jen as a witness.

At the violation hearing, Jen's statements were introduced through the transcript of her grand jury testimony, her c. 209A affidavit, and the testimony of Sergeant Leavitt. The defendant called Jen's ex-husband and an ex-boyfriend to testify to Jen's character for untruthfulness and her pattern of conduct in prior relationships. The hearing judge sustained objections to much of their testimony, concluding that it constituted inadmissible

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[2] See Krochta v. Commonwealth, 429 Mass. 711, 716 n.12 (1999) ("The Commonwealth is the party against whom the defendant litigates at both a probation revocation proceeding and at a criminal prosecution"). Here, the district attorney's office assisted the probation department in the proceedings, as authorized by G. L. c. 279, § 3. See Commonwealth v. Tate, 34 Mass. App. Ct. 446, 447-448 (1993).

opinion evidence and was irrelevant to whether the defendant had committed the new offenses.

At the close of the proceeding, the hearing judge found the defendant in violation and subsequently sentenced him, on the remaining 2008 rape conviction, to a term of from five years to five years and one day in State prison. On the 2008 indecent assault and battery conviction, the hearing judge ordered him placed on probation for ten years, essentially concurrent with and continuing after the prison sentence. The defendant appealed.

Discussion. 1. Substantial reliability of hearsay. Hearsay evidence that is substantially reliable may serve as the basis for finding a probation violation, and a determination of substantial reliability obviates what would otherwise be the defendant's due process right to confront the witnesses against him. See Commonwealth v. Durling, 407 Mass. 108, 113, 117-118 (1990). See also Commonwealth v. Negron, 441 Mass. 685, 691 (2004). Here, the defendant argues that the motion judge erred in determining that Jen's hearsay was substantially reliable.

a. Hartfield factors. To evaluate whether the hearsay was substantially reliable, we turn to the factors listed in Commonwealth v. Hartfield, 474 Mass. 474 (2016).[3] These include:

[3] The parties cite no case expressly addressing the standard of review of a judge's decision on this issue. We will assume

> "(1) whether the evidence is based on personal knowledge or direct observation; (2) whether the evidence, if based on direct observation, was recorded close in time to the events in question; (3) the level of factual detail; (4) whether the statements are internally consistent; (5) whether the evidence is corroborated by information from other sources; (6) whether the declarant was disinterested when the statements were made; and (7) whether the statements were made under circumstances that support their veracity."

Id. at 484. Not all of these criteria must be satisfied. See Commonwealth v. Patton, 458 Mass. 119, 133 (2010); Commonwealth v. Grant G., 96 Mass. App. Ct. 721, 725 (2019).

Here, Jen's statements about the defendant's conduct were based on her personal knowledge. They were factually detailed and internally consistent,[4] with one exception discussed infra.

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in the defendant's favor, without deciding, that de novo review is appropriate. Because the motion judge based her decision on purely documentary evidence, we consider ourselves in as good a position as the judge to evaluate that evidence and to determine whether the hearsay was substantially reliable. See generally Commonwealth v. Mazza, 484 Mass. 539, 547 (2020); Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018).

[4] Her G. L. c. 209A affidavit stated that the defendant "forced himself on [her] sexually"; became psychologically abusive and controlling; said that if she tried to leave him, he would kill her; sent her a photograph of himself with a gun in his mouth and told her that the gun was "nearby"; pushed her; and held her against her will. She made essentially the same statements to Sergeant Leavitt and added considerable detail about the nature and the frequency of the forced sexual activity, his threats to harm her (including with a knife), his grabbing her by the arms and throwing her to the floor, his controlling, jealous comments and suspicion of her involvement with other men, and his physically blocking her from leaving their apartment. Her grand jury testimony added some details about how the defendant held her down during his sexual assaults

They were corroborated to a limited extent by physical evidence.[5] They were made in circumstances supporting their veracity.[6] These factors indicate that the hearsay was substantially reliable.

b. Defendant's challenges to declarant's credibility. The defendant argued that other items of evidence before the motion judge created "serious reason to question [Jen's] credibility." We discuss those items in turn.

First, the defendant cited his private investigator's reports of interviews with four neighbors who lived in the same apartment building as the defendant and Jen. Three neighbors

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and bruised her arms and legs, and also once held a knife to her throat while he was angry.

[5] The photograph of the defendant with a gun in his mouth was an exhibit before the grand jury and at the violation hearing. Recordings of voicemails that the defendant left for Jen, demonstrating what could reasonably be described as a jealous, suspicious, and sometimes threatening attitude, were admitted in the grand jury proceeding. Sergeant Leavitt's report stated that when Jen told him about the defendant's conduct, she was very upset, crying, and scared. Cf. Commonwealth v. King, 71 Mass. App. Ct. 737, 741 (2008) (alleged victim's unconcerned demeanor when telling officers about defendant's break-in and threat "fundamentally undermine[d] her credibility," rendering her statements insufficiently reliable to support finding of probation violation).

[6] Jen's statements in her c. 209A affidavit and to the grand jury were made under oath. See Commonwealth v. Henderson, 82 Mass. App. Ct. 674, 679 (2012). Also, that it is a crime to falsely report a crime to a police officer bolsters the reliability of Jen's statements to Sergeant Leavitt. See Commonwealth v. Nunez, 446 Mass. 54, 59 (2006); Negron, 441 Mass. at 691.

described overhearing Jen yelling at and berating the defendant, sometimes profanely. The fourth neighbor "only heard laughing and giggling" from their apartment, "never . . . any yelling or screaming, or any suggestion of fighting." None of the neighbors reported hearing or seeing any signs of physical fighting or other physical abuse.

This evidence, if believed, would show that the neighbors were unaware of the forced sexual and other acts that Jen alleged against the defendant. But it would not show that the defendant, in the confines of the apartment, did not commit those acts. Indeed, the defendant conceded at oral argument that nothing said by the neighbors directly contradicted Jen's statements about what the defendant had done to her.[7] This evidence therefore does not call into question the substantial reliability of Jen's hearsay statements.

Second, the defendant cited his investigator's reports of interviews with Jen's ex-husband and an ex-boyfriend. The ex-husband described Jen, with whom he had a child born in 2004, as mentally unstable, mean, and sometimes vicious. He related various past incidents that, in his view, showed Jen's

[7] Moreover, neither the neighbors' statements nor the investigator's reports of those statements were made under oath. The reports consisted largely of layered hearsay.

dishonesty.[8] The ex-boyfriend described Jen's personality in similar terms; he added that she was controlling and jealous, frequently accusing him of being interested in other women. He, too, related numerous past incidents in which, he said, Jen had been dishonest.[9]

Again, however, the defendant conceded at oral argument that nothing said by the ex-husband or the ex-boyfriend directly contradicted any of Jen's hearsay statements about what the

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[8] First, the ex-husband stated that, in advance of a probate court appearance, Jen had threatened to provide the judge with old text messages and photographs the ex-husband had sent her, and to present them as evidence of his current behavior, in order to gain leverage in the proceeding. The ex-husband said that he did not alter his approach to the proceeding, and he did not state whether Jen had followed through on her threat. Second, after their child told him that Jen had physically threatened her, he sought a c. 209A order on the child's behalf; at a hearing on the request, Jen denied the child's allegations, but a judge nevertheless issued the order against Jen. Third, the ex-husband said that Jen had reportedly made statements to school officials that were contrary to the ex-husband's and the child's plans regarding where to attend high school. Fourth, he knew that an ex-boyfriend of Jen's had accused her of stealing one hundred dollars from his wallet. The ex-husband did not claim personal knowledge of Jen's underlying conduct in any but the first of these incidents.

[9] In one incident, after an argument in public, Jen started hitting the ex-boyfriend and then told passing police officers that she had been attacked, leading the ex-boyfriend to be arrested and later to plead guilty to assault. Other incidents involved Jen pretending to him that she was still employed at a job despite having been fired from it two weeks earlier, and Jen stealing $200 from his dresser drawer and then denying it. Finally, he once observed Jen in the bathroom, slapping her own face to make it look red; when he asked what she was doing, she replied, "[Y]ou hit me[,] remember?"

defendant had done to her. Her alleged dishonesty in two prior relationships was not sufficient to show that she had a character for untrustworthiness, rendering her descriptions of the defendant's acts not substantially reliable under the Hartfield factors. We shall return to the character evidence point infra when discussing the limits placed on the ex-husband's and the ex-boyfriend's testimony at the violation hearing.

Third, defense counsel's affidavits asserted that on February 3 and 4, 2019, while Jen and the defendant still lived together, Jen gave the defendant a cake for his birthday, spoke to the defendant's mother about the plans for Jen's and the defendant's wedding the coming summer, and had a photograph taken in which Jen kissed the defendant's cheek. Assuming the truth of these assertions,[10] the events occurred one week before February 11, 2019, the date Jen first went to Sergeant Leavitt with her allegations against the defendant.[11] A victim of

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[10] Counsel's affidavits asserted no personal knowledge of the events described, and the attached photograph was undated.

[11] Sergeant Leavitt's report indicated that Jen told him that the forced sex and the defendant's efforts to prevent her from leaving the apartment lasted through the end of January 2019. At a dangerousness hearing, held before the violation hearing, Sergeant Leavitt testified that the relationship ended at the end of January, but he also testified that she said she was still living with the defendant as of February 11. We do not view the precise dates as critical. As was observed in another domestic violence case, "[t]he end of a relationship is

domestic violence and sexual abuse may feel considerable ambivalence about leaving her abuser and may have great difficulty giving up hope that the relationship will improve. That Jen may have harbored such a hope does not make her allegations so unreliable that they could not support a finding of a probation violation.

Fourth, the defendant cited evidence that, after Jen made her allegations against the defendant and obtained the c. 209A order, she wanted to obtain the return of a valuable engagement ring that he had previously given her, and that she gave back to him when she ended their relationship, but that she still considered her property. This request did not so undermine the reliability of her allegations against the defendant as to render them not substantially reliable for purposes of the violation hearing.[12] At that hearing, Sergeant Leavitt testified that by about March 1, 2019, Jen had lost interest in obtaining the ring.

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not always clean margins." McIsaac v. Porter, 90 Mass. App. Ct. 730, 735 (2016).

[12] The defendant argued that Jen's desire for the return of the ring could be explained only by Jen's desire "for economic gain." He did not suggest that she had lied about being raped in order to realize some economic gain. The defendant thus gains nothing from his reliance on Commonwealth v. Wilson, 47 Mass. App. Ct. 924, 925-926 (1999) (hearsay allegation against probationer not substantially reliable where, among other things, declarant had motive to fabricate).

Fifth, the defendant pointed to Jen's inconsistent statements about consensual sex. She told Sergeant Leavitt that on some occasions while she lived with the defendant, they had consensual sex, but she later told the grand jury that no consensual sex had occurred, and she was not asked to explain her prior inconsistent statement to Sergeant Leavitt. Whether or not there was occasional consensual sex, however, Jen was consistent in stating that the defendant had frequently forced sex on her while they lived together. The inconsistency on this one point is not trivial, but hearsay need not satisfy all seven Hartfield criteria in order to be substantially reliable. See Grant G., 96 Mass. App. Ct. at 725. Cf. Commonwealth v. Henderson, 82 Mass. App. Ct. 674, 679 n.8 (2012) (c. 209A affidavit and police report, taken together, were substantially reliable, where there was "[n]o serious misalignment" between them).

Finally, the defendant attempted to cast doubt on one detail in Jen's description of how the defendant prevented her from leaving the apartment. In her c. 209A affidavit, Jen stated that the defendant had "h[e]ld[] [her] against [her] will." She told Sergeant Leavitt that the defendant sometimes "forcefully prevent[ed] her from leaving the apartment"; "she would try to leave and he would physically block her way . . . out." During these periods, he would threaten her with violence

and say he knew people who would find and follow her if she left. In Jen's grand jury testimony, she explained how the defendant had threatened her and "barricaded the door" to prevent her from leaving.

In response to Jen's use of the phrase "barricaded the door," defense counsel filed an affidavit recounting his conversation with the landlord of the defendant's and Jen's apartment building. The landlord told counsel that the apartment's bedroom had two means of egress, each of which led to an exterior door. The defendant thus questioned how he could possibly have barricaded the door to prevent Jen from leaving.

The motion judge did not, and we do not, view Jen's single use of that phrase, describing (whether literally or figuratively) one detail of the defendant's conduct, as undermining the credibility of her consistent statement on this issue: the defendant had on occasion, through threats and the use of force, prevented her from leaving the apartment. As suggested above, absolute consistency between a declarant's various hearsay statements is not a prerequisite to a conclusion that those statements taken together are substantially reliable.

In sum, the defendant skillfully mustered evidence to create questions about Jen's honesty in prior relationships and about some aspects of her relationship with him. Nevertheless,

we agree with the motion judge's ruling that Jen's hearsay statements were substantially reliable.

2. Right to call declarant as witness at violation hearing. "[T]he admission of [substantially reliable hearsay] evidence does not mean that the probationer is absolutely barred from calling as a witness the declarant whose hearsay was admitted." Hartfield, 474 Mass. at 482. Here, the defendant sought to call Jen as a witness, arguing that this was essential to his due process right to present a defense. He argues that the motion judge erred in allowing the Commonwealth's motion to preclude him from calling her. In so ruling, the judge applied the principles established in Hartfield. We review those principles and then discuss their application here; we conclude that there was no error in the judge's ruling.[13]

a. The Hartfield analysis. The court in Hartfield makes clear that the due process right to present a defense at a probation violation hearing (1) is distinct from "and should not be conflated" with a defendant's right to confront witnesses, Hartfield, 474 Mass. at 479, citing Commonwealth v. Kelsey, 464 Mass. 315, 327 n.12 (2013); (2) "is parallel to, but not

[13] As with the substantial reliability issue, the parties cite no case expressly addressing the standard of review of a judge's decision under this aspect of Hartfield. We will again assume in the defendant's favor, without deciding, that de novo review is appropriate.

coextensive with, the right to present a defense at trial" (citation omitted), Hartfield, supra at 480; and (3) "depends on the totality of the circumstances in each case" (citation omitted), id. The totality of the circumstances test generally requires a judge to consider whether the particular step the probationer wishes to take to advance his defense "will sufficiently advance the 'reliable, accurate evaluation of whether the probationer indeed violated the conditions of his probation,' . . . so as to outweigh the Commonwealth's 'significant interests in informality, flexibility, and economy'" (citations omitted).[14] Id. Ordinarily, "a probationer has a presumptive due process right to call witnesses in his or her defense, but . . . the presumption may be overcome by countervailing interests, generally that the proposed testimony is unnecessary to a fair adjudication of the alleged violation or unduly burdensome to the witness or the resources of the court."[15] Id. at 481.

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[14] Stated more fully, the Commonwealth has interests "in expeditiously containing the threat posed by a noncompliant probationer; in imposing effective punishment when a convicted criminal is unable to rehabilitate himself on probation; in being able to revoke probation, when appropriate, without repeating the prosecutorial efforts already expended at trial; and in keeping judicial administrative costs to a minimum." Kelsey, 464 Mass. at 321, citing Durling, 407 Mass. at 116.

[15] A different analysis applies where the right to present a defense conflicts with some privilege. Hartfield, 474 Mass. at 479-480, citing Kelsey, 464 Mass. at 321-327. Related totality

In making this determination, the Hartfield court, 474 Mass. at 481, instructs judges to consider at least the following factors:

> "(1) whether the proposed testimony of the witness might be significant in determining whether it is more likely than not that the probationer violated the conditions of probation, (2) whether, based on the proffer of the witness's testimony, the witness would provide evidence that adds to or differs from previously admitted evidence rather than be cumulative of that evidence, and (3) whether, based on an individualized assessment of the witness, there is an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify" (citations omitted).

Importantly, and contrary to the dissent's suggestion, post at , the Hartfield court did not go on to apply these factors to the case before it in order to conclude that the judge had erred in barring the defendant from calling his accuser as a witness. Instead, the court remanded for a new hearing at which the judge could consider these factors and decide whether to permit such testimony. Id. at 483.

As neither Hartfield nor any other reported decision has applied these factors, some further discussion of them, and

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of the circumstances tests to determine whether the presumptive due process right to call witnesses in one's defense may be overcome by countervailing interests, including the protection of a victim, have been applied in other contexts. See Commonwealth v. Nick N., 486 Mass. 696, 708-709 (2021) (hearings under Wallace W. v. Commonwealth, 482 Mass. 789 [2019], to prove juvenile's commission of certain first offenses); Commonwealth v. Molina, 476 Mass. 388, 407-408 (2017) (restitution hearings).

particularly the first and second factors, is in order. When a defendant seeks to call a witness whose hearsay statements have already been ruled admissible, there may appear to be some overlap between the questions whether the witness's testimony would be "significant" (the first factor) and whether it would be "cumulative" (the second factor). Hartfield, 474 Mass. at 481. Nevertheless, we see at least one pertinent distinction: the first factor requires that the testimony's significance be evaluated in light of the preponderance of the evidence standard of proof.

"In a probation revocation hearing, the issue to be determined is not guilt beyond a reasonable doubt but, rather, whether the probationer more likely than not violated the conditions of his probation." Kelsey, 464 Mass. at 324. It follows that, from the defense standpoint, witness testimony that might be significant at a criminal trial -- i.e., testimony that might be just enough to create a reasonable doubt about a defendant's guilt -- may be less significant at a probation violation hearing, where the Commonwealth need prove its case only by a preponderance of the evidence. Although the defendant still has important liberty interests at stake, the reality is that, at such a hearing, once the Commonwealth has made out a prima facie case -- even one based on substantially reliable hearsay -- a defendant must do more than merely raise a

reasonable doubt in order to successfully resist that case. Cf. Hartfield, 474 Mass. at 483 ("Pragmatically, to prevail at the revocation hearing given the evidence already admitted, the probationer needed to establish that it was more likely than not that the alleged victim fabricated the alleged rape").

Put differently, calling the hearsay declarant as a witness is unlikely to be "significant" in determining whether a defendant violated probation, Hartfield, 474 Mass. at 481, unless that defendant has some reasonable prospect of substantially damaging the credibility of the witness's core hearsay statements establishing the probation violation. Merely undermining the credibility of the witness's hearsay statements on secondary details is unlikely to be "significant" for purposes of the first Hartfield factor. Id.

With respect to the second factor, Hartfield recognizes that where a defendant seeks testimony from a witness whose hearsay statements have already been ruled admissible, "the testimony would not be cumulative where the probationer seeks to elicit from the witness additional information that would support the inference that the probationer did not commit the violation or would demonstrate that the hearsay evidence suggesting that he did commit the violation is unworthy of belief." Hartfield, 474 Mass. at 482. But it cannot be enough merely to hope to elicit testimony showing that the witness's

prior hearsay statements are unworthy of belief. For this factor to weigh significantly in favor of a defendant, that defendant must show, based on a proffer of the witness's own testimony, some real prospect of eliciting such testimony. See id. at 481.

b. Application of the Hartfield analysis. Here, the motion judge focused on the second and third Hartfield factors. She ruled that the defendant's proffer of evidence aimed at undermining Jen's credibility was insufficient to show that Jen's testimony at the violation hearing would add to or differ from her hearsay statements that the judge had already ruled admissible. And she determined, with ample evidentiary support, that there was a "legitimate risk that being forced to testify . . . will cause [Jen] considerable anxiety and emotional distress based on the evidence of observations of [Jen's] demeanor when testifying or discussing the assaults previously."[16] Balancing these factors, the motion judge ruled

[16] The evidence supporting this conclusion included Sergeant Leavitt's police report stating that when Jen first spoke to him, she was "very upset and cried quite a bit while discussing some of the events she has endured." It also included the prosecutor's affidavit stating that when she first met with Jen at the police station, Jen trembled, cried, expressed great fear of the defendant, and reported nightmares, sleeplessness, and worsening anxiety, which had caused her to seek help from a domestic violence crisis center. When the prosecutor met with Jen before her grand jury testimony, Jen exhibited and reported the same feelings and conditions and feared that she might vomit while testifying. During that testimony, Jen became unable to

that the defendant's right to call Jen as a witness in his defense was outweighed by two countervailing interests: Jen's "proposed testimony [would be] unnecessary to a fair adjudication of the alleged violation" and it would be "unduly burdensome" to her. Hartfield, 474 Mass. at 481.

On appeal, the defendant essentially contends that the motion judge undervalued the defendant's proffer of reasons to doubt Jen's credibility. Based on our understanding of the first and second Hartfield factors, however, we are not persuaded.

The reported statements by neighbors about secondary details of Jen's relationship with the defendant, and the reported statements by Jen's ex-husband and an ex-boyfriend about her past relationships with them, did not directly contradict anything in her hearsay statements. Jen's reported acts demonstrating some ambivalence before she left the defendant, and her later brief interest in regaining possession of the ring he had given her, did little if anything to undermine her credibility. The evidence that it might have been

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speak, started to cry, began to breathe rapidly, and required a break to regain her composure. Later, when Jen received a summons to testify at the violation hearing, she became "extremely upset," expressed "extreme anxiety," and told the prosecutor that "it would be too traumatic for her right now" to be in the same room as the defendant. She understood, however, that she would have to testify if the indictments of the defendant proceeded to trial.

difficult for the defendant literally to barricade the apartment door concerned only one detail of one of the many offenses she accused him of committing. The defendant did not, through these submissions, show any reasonable prospect that Jen's live testimony would substantially damage her credibility so as to be "significant in determining whether it [was] more likely than not" that he had violated his probation. Hartfield, 474 Mass. at 481. To the extent that Jen's varying statements about consensual sex could be considered a proffer of what she might say if called to testify, they, too, involved a secondary detail. They did not demonstrate any real prospect of eliciting testimony showing that her central and consistent statements that the defendant raped her and committed other crimes against her were "unworthy of belief."[17] Id. at 482.

Indeed, the motion judge pressed defense counsel on whether, if given the opportunity to cross-examine Jen, he

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[17] This case is factually unlike Hartfield, where the court's conclusion that there were "strong reasons to question the credibility of the alleged victim" was based on numerous items of evidence regarding the alleged assault itself (including physical, alibi, and motive to fabricate) that directly called into question the alleged victim's hearsay statements about that assault. Hartfield, 474 Mass. at 483. Even then, contrary to what the dissent intimates, post at , the court did not rule that these strong reasons gave the defendant a right to call the alleged victim as a witness. Instead, the court concluded only that the judge's failure to apply the proper test in deciding that issue was not harmless beyond a reasonable doubt. Hartfield, 474 Mass. at 483.

expected her either to "recant" or to "tell a completely different story." In response, counsel declined to predict that Jen's testimony would produce any such helpful evidence for the defense. Instead, tellingly, he emphasized that the opportunity to cross-examine her would be "of invaluable importan[ce] to [the defendant] realizing his due process rights to be able to confront her."

The flaw in this argument is that the confrontation right was no longer at issue, because the determination that Jen's hearsay statements were substantially reliable provided good cause to dispense with confrontation. See Negron, 441 Mass. at 691. The defendant instead claimed to be asserting his due process right to call Jen in order to present a defense -- a "distinct" right, Kelsey, 464 Mass. at 327 n.12, that "must be analyzed separately," Hartfield, 474 Mass. at 479. That right does not extend to calling a witness whose testimony would add little or no significant evidentiary value under the first two Hartfield factors, where requiring such testimony would also -- under the third Hartfield factor -- create an unacceptable risk to the witness's emotional health. See id. at 481. Such was the case with Jen's proposed testimony here. We thus conclude that, under Hartfield's totality of the circumstances test, see id. at 480-481, the motion judge's decision to bar the defendant from calling Jen as a witness did not deny him his due process

right to present a defense. We recognize the seeming harshness of this result, which allows the defendant to be sentenced to a lengthy period of incarceration based on a probation violation without being able to call his accuser as a witness. Nevertheless, our understanding of the Hartfield test, as applied to these facts, requires us to reach this result.

3. Right to present other evidence at violation hearing. Finally, the defendant argues that he was further denied his right to present a defense when the hearing judge limited the topics about which Jen's ex-husband and ex-boyfriend could testify. The defendant called these witnesses in order to show what he termed Jen's character for untruthfulness and her pattern of conduct in prior relationships. He represented that their testimony about those issues would have been similar to what was in their interview reports, which we discussed supra. The hearing judge did not entirely bar them from testifying, but she precluded their testimony on those two issues.[18]

In analyzing the defendant's challenge to those rulings, we first review whether the proffered testimony was admissible under the rules of evidence. Determining that it was not, we then consider the defendant's intertwined arguments that it was nevertheless admissible because (1) it was otherwise reliable

[18] The reports themselves were marked for identification but not offered or admitted in evidence.

and thus admissible at a probation violation hearing, where the rules of evidence do not apply; and (2) it was essential to his due process right to present a defense. We conclude that the evidence was properly excluded.

a. Admissibility under rules of evidence. "Even though standard evidentiary rules do not apply to probation revocation hearings, the first step is to determine whether the evidence would be admissible under those rules, including the exceptions to the hearsay rule. Evidence which would be admissible under standard evidentiary rules is presumptively reliable." Durling, 407 Mass. at 117-118.

i. Character for truthfulness. The proffered testimony of Jen's ex-husband and an ex-boyfriend was inadmissible to prove her character for truthfulness.[19] "[A] party may impeach a witness by attacking the witness's character for truthfulness . . . through general reputation evidence." Commonwealth v. Almonte, 465 Mass. 224, 241 (2013). See Mass. G. Evid. § 608(a) (2021). "[W]hile evidence of a defendant's general reputation in his community or at his workplace is admissible, evidence in

[19] We note that Jen's absence from the violation hearing did not preclude the defendant from attempting to impeach her hearsay statements. "When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Mass. G. Evid. § 806 (2021). See Commonwealth v. Mahar, 430 Mass. 643, 649 (2000).

the form of private opinions is not." Commonwealth v. Walker, 442 Mass. 185, 198 (2004). See id. at 198-199 & n.25 (noting but declining to follow Fed. R. Evid. § 405[a], which permits opinion testimony regarding witness's character for truthfulness).

Here, the hearing judge permissibly ruled that the testimony of two witnesses about their own experiences with Jen, combined with one of those witness's account of what another of Jen's ex-boyfriends had told him, was insufficient to establish her reputation in any "community," because it was based on the opinions of "too limited a group," i.e., three individuals. Commonwealth v. LaPierre, 10 Mass. App. Ct. 871, 871 (1980) (testimony about witness's reputation among three coworkers was insufficient). See Commonwealth v. Dockham, 405 Mass. 618, 630-631 (1989).

Nor could Jen's character for truthfulness be proved by the specific instances of past untruthfulness to which her ex-husband and ex-boyfriend would have testified. "In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking . . . the witness's credibility." Commonwealth v. Lopes, 478 Mass.

593, 606 (2018), quoting Mass. G. Evid. § 608(b) (2017). See Almonte, 465 Mass. at 241.[20]

ii. Pattern of conduct in prior relationships. Nor was testimony of Jen's ex-husband and an ex-boyfriend about her conduct in her relationships with them admissible to prove her conduct in her relationship with the defendant. The defendant argued that the Commonwealth sought to depict him as having created a "climate of fear" in his relationship with Jen. To rebut this, he offered the ex-husband's and an ex-boyfriend's testimony that in their relationships with Jen, she was the one who had created a climate of fear. The hearing judge ruled that the proffered evidence of Jen's past relationships was not probative of her relationship with the defendant or relevant to whether he had raped and committed other offenses against her.

On appeal, the defendant does not explain how Jen's conduct in prior relationships was admissible for any relevant purpose, "such as proving [her] motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mass. G. Evid. § 404(b)(2) (2021). The defendant has thus failed to show any abuse of discretion or other error

[20] The court in Almonte recognized that Fed. R. Evid. 608(b) allows cross-examination about prior instances of untruthfulness, but the court nevertheless "decline[d] . . . to abandon [the Commonwealth's] long-standing limitation" prohibiting it. Almonte, 465 Mass. at 241.

in the hearing judge's ruling that this evidence was inadmissible under the rules of evidence.[21]

b. Admissibility based on reliability. Under Durling, evidence that is inadmissible under the rules of evidence may still be admitted at a probation violation hearing, if reliable.

> "If the proffered evidence is not admissible under standard evidentiary rules, then a court must independently look to the reliability of that evidence. Unsubstantiated and unreliable hearsay cannot, consistent with due process, be the entire basis of a probation revocation. When hearsay evidence is reliable, however, then it can be the basis of a revocation."

Durling, 407 Mass. at 118.[22] Relatedly, the extent of a defendant's due process right to present a defense at a probation violation hearing depends in part on the reliability of the proffered evidence. See Kelsey, 464 Mass. at 322 (considering whether desired means of advancing defense "will

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[21] The defendant gains nothing from relying on United States v. Stamper, 766 F. Supp. 1396 (W.D.N.C. 1991), aff'd per curiam, 959 F.2d 231 (4th Cir. 1992). There, a defendant had a confrontation clause right to offer evidence about a complaining witness's prior fabrications, "as proof of a contrived ulterior motive and plan." Stamper, 766 F. Supp. at 1402. See Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 337-338 (1994) (discussing Stamper). The defendant here does not explain what motive or plan Jen had that made her prior relationships relevant to her relationship with him.

[22] Although Durling focused on the admissibility of reliable hearsay not within any established hearsay exception, we will assume that its essential framework applies to evidence inadmissible for reasons other than that it is hearsay. Cf. Commonwealth v. Thissell, 457 Mass. 191, 196-198 & n.13 (2010); Commonwealth v. Sargent, 98 Mass. App. Ct. 27, 29-32 & n.8 (2020).

sufficiently advance the 'reliable, accurate evaluation'" of whether defendant violated probation [citation omitted]).[23] We therefore consider whether, here, the proffered testimony of Jen's ex-husband and an ex-boyfriend regarding Jen's veracity, even though inadmissible under the rules of evidence, was sufficiently reliable to be admitted at the hearing.[24] Focusing in particular on their proffered testimony about specific instances of Jen's past untruthfulness, see supra, we conclude that such testimony would not have been reliable because the

[23] Reliability is also a central consideration when a defendant in a criminal trial asserts his due process right to present evidence in his defense. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). See also Green v. Georgia, 442 U.S. 95, 97 (1979); Commonwealth v. Drayton, 473 Mass. 23, 33-36 (2015), S.C., 479 Mass. 479 (2018). A "defendant's constitutional right to present evidence shown to be relevant and likely to be significant may override a State's rule of exclusion of evidence." Commonwealth v. Sugrue, 34 Mass. App. Ct. 172, 177 (1993). However, the right is not violated by the exclusion of evidence that is not "reliable and trustworthy." Commonwealth v. Evans, 439 Mass. 184, 193, cert. denied, 540 U.S. 923, and cert. denied, 540 U.S. 973 (2003). See Commonwealth v. McAfee, 430 Mass. 483, 491 n.3 (1999).

[24] We consider only their testimony regarding her veracity, because the defendant has not persuasively explained, even by analogy to any purpose permissible under Mass. G. Evid. § 404(b)(2) (2021), how their testimony regarding her creation of a climate of fear in their relationships was relevant to whether the defendant had raped her and committed other offenses against her.

defendant did not proffer any independent verification that Jen had actually been untruthful on those occasions.[25]

There are, to be sure, narrow circumstances in which the rule against using instances of past untruthfulness to impeach a witness's credibility must yield to the defendant's constitutional right to present a defense. See Commonwealth v. Bohannon, 376 Mass. 90, 93-95 (1978), S.C., 385 Mass. 733 (1982). Specifically, a defendant may impeach the complaining witness in a rape or sexual assault case by showing that the witness has previously made false allegations of the same crime -- provided, among other things, that the defendant has "a factual basis from independent third[-]party records for concluding that prior allegations of rape had, in fact, been made and were, in fact, untrue." Bohannon, supra at 95. See Lopes, 478 Mass. at 606 n.11 (exception limited to prior false accusations of rape or sexual assault). See also Commonwealth v. Nichols, 37 Mass. App. Ct. 332, 335 (1994). As the court made clear in its second Bohannon decision, such independent records must themselves be reliable, and the exclusion of

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[25] We need not determine what sort of proffer of independent verification might suffice in these circumstances, where the witness whose credibility the defendant seeks to challenge is not present to be cross-examined about the alleged past instances of untruthfulness. Plainly, however, one consideration would be "the Commonwealth's 'significant interests in informality, flexibility, and economy'" (citation omitted). Kelsey, 464 Mass. at 322.

unreliable hearsay evidence of a critical witness's prior falsehoods does not violate a defendant's constitutional right to present a defense. See Commonwealth v. Bohannon, 385 Mass. 733, 749-751 (1982). Decisions declining to admit Bohannon evidence most commonly do so because of "the absence of evidence from an independent source that the collateral allegation was false." Nichols, supra (collecting cases).[26]

Here, as the defendant acknowledged, Bohannon was not directly applicable -- because Jen's ex-husband and an ex-boyfriend would not testify that Jen had made any prior false allegations of rape or sexual assault -- but the defendant argued, by analogy to Bohannon, that the judge should permit them to testify regarding Jen's prior instances of willingness

[26] The defendant calls to our attention that Fed. R. Evid. § 608(b), although prohibiting a witness's character for truthfulness from being attacked with extrinsic evidence of specific past instances of untruthfulness, nevertheless allows a witness, in the court's discretion, to be cross-examined about such past instances. However, because "[t]he mere asking of [such] questions, . . . may suggest the truth of the allegations," and thereby risk undue prejudice, "the courts have held that the party seeking to inquire into misconduct of a witness can be required to make a threshold showing that there is some factual basis for the allegations." 28 C.A. Wright & V.J. Gold, Federal Practice and Procedure § 6118, at 106 n.21 (2012). For example, in the Federal case the defendant relies on, United States v. Whitmore, 359 F.3d 609, 614, 619 (D.C. Cir. 2004), the court held that the trial judge should have permitted a defendant, in cross-examining a police witness, to ask whether the officer had lied under oath at a prior trial, where the judge at that prior trial had made an express finding that the officer had lied.

to lie. The judge ruled that any such analogy would require, as in Bohannon, "independent third[-]party records" showing that Jen's prior statements were false.[27] See Bohannon, 376 Mass. at 95. Without them, the defendant was merely proffering "a witness's opinion testimony that somebody else was lying," which the judge declined to consider. Cf. Commonwealth v. Triplett, 398 Mass. 561, 567 (1986) (witness may not express opinion about credibility of another witness).[28]

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[27] The Supreme Judicial Court recently recognized, by analogy to Bohannon, that where a police officer's credibility is a critical issue at trial, evidence of the officer's prior false statements in a separate matter might be admissible for impeachment purposes. See Matter of a Grand Jury Investigation, 485 Mass. 641, 650-653 (2020). But there, the evidence of false statements was obtained through immunized grand jury testimony, and the district attorney invoked his duty to disclose it as exculpatory material. Id. at 642, 645. Its reliability was not questioned. The court indicated that, in future cases, whether an officer could be impeached with prior misconduct would depend, among other things, on "the strength of the evidence of the prior misconduct and the simplicity of establishing it." Id. at 652. The defendant here also cites Commonwealth v. McMillan, 98 Mass. App. Ct. 409 (2020), where we recognized, in particular circumstances, a defendant's right to cross-examine police officers about prior acts of misconduct by a confidential informant to whom the defendant had allegedly sold drugs. Id. at 411-413, 417-418. But, in McMillan, unlike here, there was no question about the reliability of the evidence of the informant's prior acts of misconduct. See id. at 411-412.

[28] The defendant also argues that the ex-husband's and the ex-boyfriend's own views of Jen's reputation for truthfulness were sufficiently reliable to be admissible. But such narrowly based reputation evidence is not reliable. "It is only where the sources are sufficiently numerous and general that they are viewed as trustworthy." LaPierre, 10 Mass. App. Ct. at 871.

This was a proper basis for concluding that the proposed testimony about Jen's past instances of untruthfulness was not substantially reliable. Absent independent verification that Jen had lied on those past occasions, the proposed testimony was unreliable and thus inadmissible under Durling.

c. Admissibility under due process right to present a defense. Finally, the defendant argues that the limits imposed on the ex-husband's and the ex-boyfriend's testimony violated his due process right to present his defense that Jen was lying. But those limits did not entirely foreclose the defendant from presenting his defense. Even at a criminal trial, where the right to present a defense is more extensive, see Kelsey, 464 Mass. at 324, a "defendant is not necessarily deprived of the right to present his theory of defense simply because the judge excludes a piece of evidence supporting such theory" if the defendant can present other evidence supporting that theory (citation omitted). Commonwealth v. White, 475 Mass. 724, 743 (2016). This same principle applies to probation violation hearings. See Commonwealth v. Pickering, 479 Mass. 589, 596 (2018). Here, although barred from presenting evidence about Jen's relationships with other men, the defendant presented

other evidence more directly relevant to her relationship with him.[29]

We therefore conclude that the exclusion of much of the ex-husband's and the ex-boyfriend's testimony did not violate the defendant's right to present a defense. Cf. Pickering, 479 Mass. at 598 (nexus between excluded evidence and defendant's defense to probation violation "depend[ed] on multiple unsupported inferential leaps"; "the defendant's claim of an infringement on his right to present a defense is further belied by the fact that he presented other compelling evidence that was more probative of his theory of defense").

Conclusion. The order revoking probation and imposing sentence is affirmed.

So ordered.

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[29] Specifically, the defendant presented evidence that, throughout Jen's relationship with him, she had never expressed any concerns about his conduct to their landlord, to the police, to the defendant's probation officer (with whom Jen had previously met), or to her ex-husband or their child (despite Jen's being in contact with both of them). The landlord testified that there had been no complaints from neighbors. Furthermore, the defendant elicited testimony that called into question Jen's claims that the defendant had damaged their apartment during an argument, and that she had been physically injured and forcibly confined there. The defendant also elicited police testimony that, when the defendant was arrested and told of Jen's allegations, he was "surprised" and "shocked"; he "didn't understand" and asked for details. The defendant also relied on his statement under oath, at the G. L. c. 209A hearing, denying Jen's allegations.

ENGLANDER, J. (dissenting). The process employed in this probation revocation hearing deprived the defendant of his fundamental due process right to defend himself in court. The victim's allegations were very serious -- in her grand jury testimony she described multiple rapes and assaults, among other crimes. As is common in sexual assault cases, the outcome turned on whether the fact finder determined the victim to be credible; there was no evidence corroborating that the victim had been assaulted, nor was there corroborating evidence of any violence or threat by the defendant. The defense was that the victim was lying. Despite this direct challenge to the victim's credibility, the hearing process allowed the Commonwealth to prove its case through hearsay documents without the victim testifying, and moreover, although the victim was available to testify the defendant was denied the opportunity to call the victim himself, in order to cross-examine her. Because constitutional due process requires that the defendant be allowed to call and to confront his accuser under these circumstances, I respectfully dissent.

Discussion. I am in agreement with the majority as to the source of the applicable due process law. It begins with the United States Supreme Court's decisions in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), and continues through the Supreme Judicial Court's

decisions in Commonwealth v. Durling, 407 Mass. 108 (1990), and Commonwealth v. Hartfield, 474 Mass. 474 (2016), the latter of which presented facts and issues similar to those raised in this case.

Where I disagree with the majority, perhaps fundamentally, is as to what those cases teach. Morrissey and Gagnon established that a probationer facing a probation revocation hearing retains fundamental due process rights. While those rights are not the same as those of a defendant in a criminal trial, among them is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."[1] Gagnon, 411 U.S. at 786, quoting Morrissey, 408 U.S. at 489. Building on Morrissey and Gagnon, the decisions in Durling and Hartfield further define two separate due process rights in a probation revocation hearing: (1) the right not to be determined in violation based on unreliable hearsay evidence, see Durling, 407 Mass. at 118, and (2) the right of the probationer to present a

[1] In Gagnon the Supreme Court noted: "An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. . . . While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" (emphasis added). Gagnon, 411 U.S. at 782 n.5.

defense, which includes a "presumptive due process right to call witnesses in his or her defense" (emphasis added). Hartfield, 474 Mass. at 481.

Here I have no quarrel with the majority's conclusion that the hearsay evidence -- the victim's grand jury testimony and her statements contained in the police report and G. L. c. 209A affidavit -- was properly admitted as part of the Commonwealth's affirmative case. Each of those hearsay documents had sufficient indicia of reliability to satisfy the test of Durling.

I disagree, however, that the defendant could be denied the ability to subpoena the victim, in order to cross-examine her as part of his defense. As noted, the victim's hearsay statements were essentially the only evidence that the defendant had performed the criminal acts at issue.[2] The defendant denied that those acts occurred. Cross-examination is the time-honored mechanism, in our justice system, for a defendant to test the accuracy and the credibility of a witness's statements. See California v. Green, 399 U.S. 149, 158 (1970), quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940) (cross-examination of

[2] The voicemails that the defendant left for the victim evidenced that the defendant was jealous and suspicious, but did not contain any threats. The police officer who took the victim's statement reported that she was very upset and "cried quite a bit," but he witnessed no physical evidence of assault.

witnesses "the 'greatest legal engine ever invented for the discovery of truth'"). The critical cases, including Morrissey and Hartfield, not only recognize the fundamental right to cross-examine a victim-accuser under these circumstances, but also fully endorse it; this case indeed presents the circumstance where, in the words of Gagnon, "there is simply no adequate alternative to live testimony." Gagnon, 411 U.S. at 782 n. 5.

My conclusion is entirely consistent with the Supreme Judicial Court's opinion in Hartfield. In its exposition of Hartfield the majority loses sight of the case's holding, which was that the finding of a probation violation had to be vacated because the judge had refused to allow the defendant to cross-examine the victim-accuser. 474 Mass. at 482-483. The judge there had reasoned that it was inappropriate for the defendant to call the victim where her hearsay evidence had already been admitted; the Supreme Judicial Court resoundingly rejected that reasoning, and instead embraced the defendant's due process right to call witnesses.[3] Id. at 481-483.

[3] The majority suggests that the facts in Hartfield were more favorable to the defendant then they are in this case, but they were not. Unlike here, in Hartfield there was physical deoxyribonucleic acid (DNA) evidence implicating the defendant, 474 Mass. at 477, yet the court still vacated the finding of a probation violation.

The same result as in Hartfield must obtain here, as nothing about the facts of this case suggests that the defendant's presumptive right to call witnesses can be disregarded. While the majority purports to rely on the reasoning in Hartfield (what it calls the first and the second Hartfield factors), the reasons it accepts for denying the defendant his cross-examination right are deeply flawed. First, the majority concludes that the defendant did not make an adequate showing that "the [victim] would provide evidence that adds to or differs from previously admitted evidence." Ante at . The majority reasons that the evidence proffered by the defendant had to do with "secondary details" that did not "directly contradict" the victim's hearsay statements, and that the defendant "did not . . . show any reasonable prospect that [the victim's] live testimony would substantially damage her credibility." Ante at .

In my view the quantum of evidence the majority requires a defendant to proffer before concluding that a witness must be required to testify is far too high, and its reasoning as to the potential value of cross-examination is misguided. Put simply, cross-examination is likely to be "significant" here. Hartfield, 474 Mass. at 481. The victim testified to the grand jury and stated to the police officer that the defendant regularly committed violent and enraged acts against the victim,

in the apartment, over a period of months. However, there are no bruises or other physical evidence, no medical records, no contemporaneous calls to the police or other authorities. The victim's statements also are notably lacking in certain details, such as dates and times. I do not mean to suggest that such evidence is required; it is not. See Commonwealth v. Alvarez, 480 Mass. 299, 310 n.4 (2018). But the victim's grand jury testimony and other statements were not cross-examined, and the lack of additional evidence makes cross-examination more likely to be valuable and important, in furtherance of the quest for truth.

In addition, here the defendant presented interview notes with respect to four apparently disinterested neighbors of the defendant and the victim; those notes indicated that the walls of the apartment complex were very thin, that nevertheless each neighbor had not heard or seen any evidence that the defendant was acting violently toward the victim, and indeed that they had not heard the defendant even raise his voice. In contrast, several of the neighbors had heard the victim raise her voice toward the defendant and some had witnessed aggressive behavior by the victim -- such as the victim yelling at the defendant,

and throwing his clothes over the railing of their second-floor apartment.[4]

I do not set forth the above information to suggest that it is necessarily credible, or to suggest any particular result if this matter is reheard. Rather, in my view the defendant's proffer was more than sufficient to show that cross-examination might reveal new and materially different information about the charges against the defendant. To a skilled examiner, the above interview notes suggest an array of potentially important cross-examination questions about the circumstances of the alleged assaults, as well as what the neighbors witnessed or did not witness, that might be material to the hearing judge. Due process required that the defendant be afforded the opportunity to ask those questions under the circumstances, where the victim

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[4] The two additional witnesses for the defense were a former husband and a former boyfriend of the victim. While they were not disinterested, many of their observations about the victim were consistent with the observations of the neighbors.

Because I would vacate the order based on the judge's refusal to have the victim testify, I do not express an opinion on the third issue the majority addresses, concerning the exclusion of other evidence proffered by the defense. I note, however, that we should be careful not to adopt different sets of evidentiary rules for the Commonwealth than for the defense. The majority's suggestion that certain of the defendant's evidence was properly excluded because it lacked "independent verification," even though the witness would testify from personal knowledge, strikes me as such a rule. Ante at .

was available and could have been subpoenaed to testify.[5] See Hartfield, 474 Mass. at 482.

I am not arguing that due process requires that a victim-accuser testify live in any case where a defendant so requests. Due process has a measure of flexibility, and the test requires an evaluation of all the circumstances. See Hartfield, 474 Mass. at 481 (courts must consider totality of circumstances in determining whether countervailing interests overcome probationer's presumptive right to call witnesses). It is not hard to imagine instances -- in particular where there is physical evidence or perhaps a disinterested witness -- where the victim's cross-examination is not necessary to a "reliable, accurate evaluation of whether the probationer indeed violated the conditions of his probation" (citation omitted). Id. In those instances, the defendant's right to call a particular witness in defense may yield to the Commonwealth's "significant interests in informality, flexibility, and economy." Durling, 407 Mass. at 113, quoting Gagnon, 411 U.S. at 788.

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[5] I disagree with the majority's statement that "the confrontation right [is] no longer at issue" once it is determined that the victim's hearsay statements can be admitted. Ante at . As the Supreme Court case law makes clear, the right to confront witnesses is a basic component of the due process right at issue; it does not disappear merely because the witness's hearsay statements have been deemed sufficiently reliable. Morrissey, 408 U.S. at 489.

This, however, is not such a case. In that regard, I should also address the third Hartfield factor -- whether there is "an unacceptable risk that the witness's physical, psychological, or emotional health would be significantly jeopardized if the witness were required to testify." Hartfield, 474 Mass. at 481. The motion judge relied on this factor, in part, stating that "there is a legitimate risk that being forced to testify . . . will cause the [v]ictim considerable anxiety and emotional distress." But while such considerations are certainly important, they cannot by themselves be sufficient to deny a defendant's fundamental right to present a defense. Where as here a victim or an accuser's testimony is the only material evidence of a probation violation, where the defense is that the alleged events did not happen, and where the victim-accuser is available to testify, concerns about the victim's reaction to testifying are highly unlikely to trump the defendant's right to cross-examine his accuser in order to defend himself. Nothing in the Supreme Court's decisions in Morrissey or Gagnon suggests that such concerns can overcome the defendant's fundamental rights.[6] I would vacate the order revoking probation and imposing sentence.

[6] The majority cites Supreme Judicial Court cases, from nonanalogous contexts, suggesting that those cases also recognize circumstances where "the presumptive due process right to call witnesses in one's defense may be overcome by

countervailing interests." Ante at . None of those cases involves the direct deprivation of liberty at issue in a probation revocation hearing. See Commonwealth v. Nick N., 486 Mass. 696, 708-709 (2021) (Wallace W. proceedings); Commonwealth v. Molina, 476 Mass. 388, 407-408 (2017) (restitution proceedings). At bottom, the majority is wrong because it sanctions a process whereby a person can be deprived of their basic liberty (here, incarcerated for five years), while being denied the opportunity to confront the only evidence against them.